Supreme Court, U.S.
FILED

No. 98 982 NOV 27 1998

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In The

Supreme Court of the United States

October Term, 1998

GLORIA J. THOMPKINS

Petitioner,

v.

QUINCY'S RESTAURANT, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Court of Civil Appeals of The State Of Alabama

---

PETITION FOR WRIT OF CERTIORARI

GLORIA J. THOMPKINS, pro se
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QUESTIONS PRESENTED FOR REVIEW

As to Wanton Conduct -

Did the Court err when it excluded Petitioner's claim for damages arising out of wanton conduct?

As to Wanton/Negligent Supervision -

Did the Court err when it Ordered Summary Judgement in connection with Petitioner's claim for damages arising out of wanton and negligent supervision?

As to Witness-

Did the Court err when it disallowed Petitioner's witness, who was a Clinical Psychologist, from testifying about his treatment and consultation of the Petitioner?

As to Damages -

Did the Court err when it refused to allow the jury to consider evidence of "IBS" (Irritable Bowel Syndrome) in that it was necessary relevant and material on the issues of both liability and damages?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

JURISDICTION..... 1

STATUTORY PROVISIONS AND RULES..... 1

STATEMENT OF THE CASE..... 1

REASONS FOR GRANTING THE WRIT..... 6

CONCLUSION..... 8

TABLE OF AUTHORITIES

Page

CASES

Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794 (Ala. 1989)..... 6

Harrell v. Reynolds Metal Co., 495 So. 2d 1381 (Ala. 1986)..... 6

Henderson v. City of Mobile, 611 So. 2d 249 (Ala. 1992)..... 7

Mitchell v. Moore, 406 So. 2d 347 (Ala. 1981)..... 7

Pate v. Sunset Funeral Home, 465 So. 2d 347 (1984)..... 7

West v. Founders Life Assur. Co. of Florida, 547 So. 2d 870 (Ala. 1989)..... 6

Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986)..... 6

STATUES AND RULES

Code of Alabama 1975, 7-2-314 (1) (2c)..... 1,7

Code of Alabama 1975, 6-5-488, Article 28..... 1,6

MISCELLANEOUS

Schwarzer, Summary Judgement Under the Federal Rules: "Defining Genuine Issues of Material Fact," 99 F.R.D. 465, 481, (1982)..... 6

PETITION FOR WRIT OF CERTIORARI

Petitioner pray that a writ of certiorari be issued to review the decision of the Alabama Court of Civil Appeals (a) to decide an important issue of federal law that has not been, but should be decided by the Supreme Court of the United States and (b) to exercise this court's supervisory power since the Alabama Court of Civil Appeals ruled without opinion making it impossible for Petitioner to distinguish the express language of that's Court's ruling from prior rulings of the Supreme Court of Alabama or the Court of Civil Appeals.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 USC, 1245(1). The jurisdiction of the Alabama Supreme Court was invoked pursuant to Code of Alabama 1975, 12-2-7. The jurisdiction of the Court of Civil Appeals of the State of Alabama was invoked pursuant to Code of Alabama 1975, 12-3-10.

STATUTORY PROVISIONS AND RULES

Code of Alabama 1975, 7-2-314 (1) (2c)
Code of Alabama 1975, 6-5-488, Article 28

STATEMENT OF THE CASE

All of the facts are supported by citations to the record. Respondent, Quincy's Restaurant, Inc., (hereafter "Quincy's") is a restaurant which is in the business of preparing and selling food to customers to eat on and off the premises. (R 186).

At all times relevant to this action, one of the main products sold to customers by Quincy's was yeast rolls. (R221). Yeast rolls were prepared by employees of Quincy's from scratch at the restaurant. (R186). Personnel were trained by the use of a video which demonstrated the proper manner in which to make yeast rolls from scratch. (R189).

A key ingredient (R191) in making the yeast rolls was instant yeast which came in a fourteen pound bag. (R224). Employees were trained to place the bag of yeast beside the mixing bowl, cut the bag open with a knife and place the contents of the bag in the bowl. (R225). The employees of Quincy's would thereafter prepare the yeast rolls, package the yeast rolls and provide them to customers. (R187).

On February 6, 1995, Petitioner went to the Quincy's Restaurant located on West South Boulevard in Montgomery, Alabama to purchase some yeast rolls. When Petitioner placed her order for a dozen rolls Petitioner was told that it would take about thirty minutes to prepare the rolls. (R11). Petitioner received the yeast rolls in a box and without examining them, took them home.

Upon arrival at home, Petitioner ate one roll and awoke the next morning nauseated accompanied by vomiting and diarrhea. (R14). Not knowing what had brought on the illness, Petitioner ate two more rolls the next day and the symptoms persisted. Petitioner consumed two more rolls on the 8th. (R15).

On the 9th of February, Petitioner began eating a sixth roll. While Petitioner was speaking with a friend on the phone, something got caught in Petitioner's throat and, despite Petitioner attempts to retrieve the object, Petitioner swallowed it. (R16). Upon examining the remaining portion of bread, Petitioner observed "trash hanging out" which appeared to be plastic paper balled up and when unwrapped was about 2 1/2 inches long. "It was cut at an angle, like you get scissors and cut something." (R17).

Petitioner immediately contacted her physician Dr. Harold Cox and the Health Department and was instructed to take the remainder of the roll to the doctor's office. (R19). Dr. Cox removed the object embedded in the roll and unraveled it. (R21). Petitioner was diagnosed as having gastroenteritis. (R22). Prior to this episode,

Petitioner had never suffered from gastroenteritis and had, in fact, never heard of it; nor had Petitioner suffered from any severe illness. (R24).

Upon leaving Dr. Cox's office, Petitioner took the half eaten roll and the remaining rolls back to Quincy's and showed them to Linda Sears, the manager on duty. (R25). Ms. Sears examined the roll and discovered that it contained part of the yeast roll mix bag. (R242). Ms. Sears told Petitioner that the "plastic in that bag came from the yeast roll mix" and that though "she was not the manager on duty the night that it happened... she would contact the home office and send it off to them." (R26).

After consulting with Petitioner, Ms. Sears threw the evidence away. (R246). Ms. Sears disposed of the evidence in direct contradiction to company policy which holds, "If the incident is involving a foreign object, obtain and preserve the evidence. Obtain product code numbers, manufacturer's name, and date of manufacture. Examine the quality of the product as in smell, consistency, etc., and indicate what product and how much was consumed. You will be given instructions as to what to do with the object when you call in the report to TW Risk Management." (R248-249).

Petitioner continued to feel the effects of illness and returned to Dr. Cox on February 10, 1995. (R29). Petitioner continued to see Dr. Cox and over the next 2 1/2 years he saw Petitioner some twenty-five (25) to thirty (30) times. (R114-115). Dr. Cox finally diagnosed Petitioner as having a severe case of irritable bowel syndrome (IBS). (R112).

Dr. Cox referred Petitioner to a psychologist (Dr. Taz Jones) to deal with Petitioner's stress. He further prescribed a plethora of medications to treat Petitioner symptoms all of which he opined Petitioner would have to take the rest of Petitioner's life. (R113-114).

During the early course of Dr. Cox's treatment of Petitioner, he suggested Petitioner consult the State Environmentalist Officer, which Petitioner did. This officer (Ms. Mitzie Chesser) made an onsite inspection at Quincy's Restaurant and reported that the flour with which the yeast rolls were prepared came to the Restaurant in a plastic container of a distinct color (yellow) and that it had been sliced

opened by a Quincy's employee and poured into the mix. It was her view that the container or bag or a portion thereof was ground or mixed into the yeast roll recipe. (R172-175).

Petitioner, through counsel, Jerry Blevins, filed Petitioner initial Complaint in Bullock County Circuit Court alleging Negligence (Count I), Res Ipsa Loquitur (Count II); Breach of Implied Warranty of Fitness for Human Consumption (Count III); and Violation of the Alabama Extended Manufacturers Liability Doctrine (Count IV). (R9). The case was transferred to the Circuit Court of Montgomery County on December 7, 1995. (R4).

Petitioner filed an Amendment to Complaint on January 8, 1996 (R20) and a Second Amended Complaint alleging wantonness sometime prior to February 7, 1996. The Clerk's Record does not contain Petitioner's Second Amended Complaint, however, Defendant's Answer to Plaintiff's Second Amended Complaint denying "guilt of any wantonness" was filed on February 7, 1996. (R26). Petitioner subsequently filed two other Amended Complaints. (R76 and R90 respectively).

Respondent filed a Motion for Summary Judgement on April 24, 1997 (R143) and Petitioner's Response was filed on May 9, 1997. (R230). The trial court entered an Order "that Summary Judgement is Granted to Defendant as to Count V, Wantonness" on May 12, 1997. (R305). Petitioner filed a Motion for Reconsideration on July 10, 1997 asking the Trial Court to reconsider its ruling granting Summary Judgement as to the Wantonness count. (R327). A pre-trial order was entered by the Trial Court disallowing Petitioner's Second Amended Complaint (the wantonness count) from consideration. (R335).

The trial of the case commenced on September 22, 1997. One supervisor of the Respondent (Latonya Huffman) had a supervisor named Moore (R238) who testified that all the employees were instructed and trained to open the yeast roll mixing bag away from the area of the mixing bowls to prevent foreign objects from being inside the mixing bowl. A violation of this requirement necessitated a written report of the incident. The employee mixing the yeast rolls opens the mix bag by pulling the draw string as opposed to cutting it

open. In this case it was cut open. See also testimony of store manager Donald Jackson. (R238); (R246).

Mr. Moore testified that he trained Huffman via a video film to place the mixing bag beside the bowl to mix the recipe and slice it open with a knife. (R195). He testified that the color of the roll mix bag was readily visible because of the peculiar yellow color. (R196; R249).

Employee Linda Sears, who was an assistant store manager, testified that previous to Petitioner's problem she became aware of another incident in 1994 where a portion of the mix roll bag had fallen into one of the mixing bowls during the process. The customer brought to her attention that there was a foreign object in the yeast rolls in the nature of brown paper. She brought this to the attention of Manager Raymond Moore. (R240-245).

Mr. Moore testified under oath that he was to take certain prescribed action because a complaint was made about a yeast roll containing foreign objects such as mix bag paper. His duty was to make diligent inquires. (R244). No action was taken on this initial complaint (1994) nor was any written report made.

A former manager of Respondent testified that under the circumstances of the way employees prepare the mixture to make the yeast rolls, it was impossible for a foreign object to accidentally fall into the mixing bowl. (R208). Further testimony was the fact that the difference in color and texture between the yeast mix and the material composing the bag was so distinctive that a fragment of paper could have been easily seen by the person preparing the mixture. (R196). The undisputed evidence in this case make it apparent that Manager Moore and those under him failed to properly supervise and after fair warning of the identical event ignored it.

Petitioner claimed medical expenses, which were proven, loss earnings and damages for permanent injuries. (R279-280; R45-47).

On September 24, 1997 a verdict for Respondent was rendered by the jury. (R373). Petitioner filed Notice of Appeal on October 9, 1997, pro se. (R374). Subsequently, Attorney J. Paul Lowery appeared on behalf of Petitioner. On April 24, 1998 the Court of Civil Appeals affirmed the Judgement without opinion. Upon Attorney Lowery's untimely death, Attorney Timothy C. Halstrom filed Notice

of Appearance on behalf of Petitioner and filed Petitioner's Application for Rehearing on May 8, 1998 which was denied on June 12, 1998. A Petition for Writ of Certiorari was filed in The Supreme Court of Alabama on June 19, 1998 and was denied October 16, 1998.

This Petition followed.

REASONS FOR GRANTING THE WRIT

Because this action was not pending on June 11, 1987, Ala. Code 1975, 12-21-12, mandates that Petitioner meet her burden by "substantial evidence." Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989). Under the substantial evidence test Petitioner must present "evidence of such weight and quality that a fair-mined person in the exercise of impartial judgement can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assur.. Co. Of Florida, 547 So. 2d 870, 871 (Ala. 1989). "An issue is genuine if reasonable persons could disagree." Schwarzer, Summary Judgement Under Federal Rules: "Defining Genuine Issues of Material Fact," 99 F.R.D. 465, 481 (1982). Code of Alabama 1975, 6-5-488, Article 28 provides guidelines for Product Liability Actions.

The standard of review applicable to a summary Judgement is the same as the standard for ruling on the summary judgement motion, that is, the Court must determine whether there was a genuine issue of material fact and, if not, whether the movant was entitled to a judgement as a matter of law. The Court's review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant (Petitioner) and must resolve all reasonable doubts against the movant (Respondent). Wilson v Brown, 496 So. 2d 756, 758 (Ala. 1986); Harrell v Reynolds Metal Co., 495 So. 2d 1381 (Ala. 1986).

"In order for the trial Court to find a party guilty of wanton conduct, it must be shown that with reckless indifference to the consequences the party consciously and intentionally did some

wrongful act or omitted some known duty, and that this act or omission producted the injury." Pate v. Sunset Funeral Home, 465 So. 2d 347 (1984). Code of Alabama 1975, 7-2-314 (1) (2c) provides provisions for Implied Warranty: Merchantability. Mitchell v Moore, 406 So. 2d 347 (Ala. 1981) involved a claim for damages in a wanton count whereby the Plaintiff fell on the premises of a shop or store and was injured. The trial court entered a judgement for the Plaintiff based upon the wanton count; (the Appellant argued on appeal as lessor) there was insufficent evidence. The Alabama Supreme Court ruled in its opinion that: "...Appellant had notice of another fall in the same location before Mrs. Moore's fall (Plaintiff). There is no evidence that the Appellants ever attempted to investigate or remedy this defect causing the injury." The court went on to define wantonness and then concluded: "...in light of the aforementioned, we conclude the evidence was sufficient to permit the jury to return a verdict upon the wanton count."

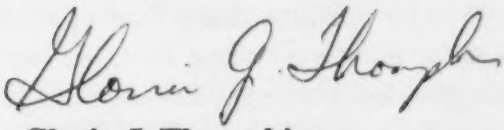
The Court of Civil Appeal's refusal to overturn the lower court's summarily dismissing the wantonness count is in conflict with the Alabama Supreme Court's holding in Henderson v. City of Mobile, 611 So. 2d 249 (1992) wherein the Court reversed the lower court's directing a verdict against Plaintiff on wantonness stating that where the Plaintiff submits substantial evidence that Defendant acted in disregard for the possibility that he could cause injury, the issue of wantonness should be presented to the jury.

The evidence in Petitioner's case indicates that there was indeed sufficient evidence to submit to the jury the wantonness claim.

CONCLUSION

Wherefore, Petitioner respectfully pray that this court will issue a Writ of Certiorari to the Court of Civil Appeals of the State of Alabama.

Respectfully submitted,



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THE FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA
MONTGOMERY COUNTY CIRCUIT COURT

No. CV 95-2638

GLORIA J. THOMPKINS

Plaintiff

v.

QUINCY'S RESTAURANT, INC.,

Defendant.

The jury returned the following verdict: "We the Jury, find for the Defendant." Judgement is hereby entered in accordance with the verdict of the Jury, judgement is in favor of the Defendant and against the Plaintiff.
DONE and ORDERED this 25th day of September, 1997.

/s/ William A. Shashy
CIRCUIT JUDGE

App. 2

IN THE COURT OF CIVIL APPEALS OF THE STATE OF ALABAMA

FILED
January 12, 1998

No. 2970050
CV 95-2638

GLORIA J. THOMPKINS

Appellant

v.

QUINCY'S RESTAURANT, INC.,

Appellee.

APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA

Affirmed. No Opinion. April 24, 1998.

For the Court,

/s/ John H. Wilkerson Jr.
CLERK

App. 3

IN THE COURT OF CIVIL APPEALS OF THE STATE OF ALABAMA

FILED
May 8, 1998

No. 2970050
CV 95-2638

GLORIA J. THOMPKINS

Appellant.

v.

QUINCY'S RESTAURANT, INC.,

Appellee.

ON APPEAL FOR REHEARING WITH APPLICATION FOR REHEARING; ARAP, RULE 39(k) SUBMISSION OF FACTS; AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

The Appellant's Application for Rehearing and Brief in support of application for Rehearing were submitted to this Court.

Application for Rehearing overruled: June 12, 1998.
No opinion written on rehearing. 39(k) Motion Denied.

For the Court,

/s/ John H. Wilkerson, Jr.
CLERK

App. 4

IN THE SUPREME COURT OF ALABAMA

FILED
June 19, 1998

No. 1971635
2970050
CV 95-2638

GLORIA J. THOMPKINS

Petitioner,

v.

QUINCY'S RESTAURANT, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI, SUPPORTING BRIEF; AND ARAP, RULE 39 (k) SUBMISSION OF FACTS

CERTIFICATE OF JUDGEMENT WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

WRIT DENIED: October 16, 1998. NO OPINION.

For the Court,

/s/ Robert G. Esdale
CLERK

CODE OF ALABAMA 1975, 7-2-314 (1) (2c). IMPLIED WARRANTY: MERCHANTABILITY

* * *

(1)Unless excluded or modified (Section 7-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2)Goods to be merchantable must be at least such as:

(c)Are fit for the ordinary purposes for which such goods are used.

* * *

CODE OF ALABAMA 1975, 6-5-488, ARTICLE 28. PRODUCT LIABILITY ACTIONS.

* * *

To establish liability under extended manufacturer's liability doctrine, a plaintiff must show: (1) he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) Showing these elements, the plaintiff has proved a prima facie case although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from, or entered into any contractual relation with, the seller.

The Principles of liablilty under the Alabama extended manufacturer's liability doctrine are stated as follows: To establish liablity, a plaintiff must show that he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

* * *